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IN THE
COURT OF APPEALS OF INDIANA

LLOYD BEETS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A04-0608-CR-440
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable William C. Menges, Jr., Judge
Cause No. 34D01-0507-FA-175

August 17, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Lloyd Beets (Beets), appeals his conviction of: Count I, dealing in cocaine, as a Class A felony, Ind. Code §§ 35-48-4-1(a)(1), 35-48-4-1(b)(1); Count II, possession of cocaine, as a Class A felony, I.C. §§ 35-48-4-6(a), 35-48-4-6(b)(3); Count V, dealing in cocaine, as a Class B felony, I.C. § 35-48-4-1(a)(1); and Count VI, possession of cocaine, as a Class D felony, I.C. § 35-48-4-6(a).

We reverse in part, affirm in part, and remand with instructions.

ISSUES

Beets raises three issues on appeal, which we restate as:

(1) Whether the trial court erred when it refused Beets' tendered jury instruction identifying statutory defenses to the element of possessing cocaine within one thousand feet of a youth program center;

(2) Whether the trial court abused its discretion in admitting certain evidence; and

(3) Whether the State presented sufficient evidence to convict Beets of dealing in cocaine, as a Class A felony.

FACTS AND PROCEDURAL HISTORY

On May 12, 2005, Kokomo Police Officer Jack Adams (Officer Adams) set up a controlled illegal drug buy, where a confidential informant (C.I.) was given $140 to purchase cocaine from a dealer named "L." With Officer Adams following him, the C.I. drove and met "L" in the parking lot of Soupley's Liquor Store. "L" exited the vehicle he arrived in and entered the C.I.'s vehicle, wherein the C.I. gave "L" the money. In return,

"L" handed the C.I. a plastic bag with nine smaller bags inside of it, each containing a white substance. After the buy, Officer Adams ran the license plate of the vehicle "L" was driving, and discovered it was registered to Sabrina Williams (Williams). "L" was later identified as Beets, and Williams as Beets' mother.

On June 30, 2005, the Kokomo Police Department conducted another controlled illegal drug buy, this time using the C.I. and an undercover officer, Officer James Klepinger (Officer Klepinger), to again purchase cocaine from Beets. Initially, the C.I. and Beets agreed to meet at the intersection of Ohio and Walnut Streets; however, Beets was not there when the C.I. and Officer Klepinger arrived. Consequently, the C.I. called Beets and arranged to pick up Beets at the intersection of Purdum and Jackson Streets. Once the C.I. and Officer Klepinger picked up Beets, Beets instructed the C.I. to "just drive." (Transcript p. 132). Thereafter, a hidden police video camera recorded Beets taking $140 and giving an "eight-ball" of crack cocaine to the C.I. in return. Beets also sold crack cocaine to Officer Klepinger. The C.I. then dropped Beets off at Taylor and Purdum Streets, three blocks from a day care facility.

The police later arrested Beets and found .71 grams of crack cocaine on his person. In addition, after testing and weighing the substances purchased at the second controlled buy, it was determined that the bag sold to Beets weighed 2.95 grams, and the bag sold to Officer Klepinger weighed 1.83 grams.

On July 7, 2005, the State filed an Information, charging Beets with: Count I, dealing in cocaine, as a Class A felony, I.C. §§ 35-48-4-1(a)(1), 35-48-4-1(b)(1); Count II, possession of cocaine, as a Class A felony, I.C. §§ 35-48-4-6(a), 35-48-4-6(b)(3);

Count III, resisting law enforcement, a Class D felony, I.C. §§ 35-44-3-3(a)(1), 35-44-3-3(b)(1); Count IV, possession of marijuana, a Class D felony, I.C. § 35-48-4-11(1); Count V, dealing in cocaine, as a Class B felony, I.C. § 35-48-4-1(a)(1); and Count VI, possession of cocaine, as a Class D felony, I.C. § 35-48-4-6(a).

On March 10, 2006, a jury trial was held. The jury found Beets guilty of Counts I, II, V, and VI. The trial court merged the two Counts of possession of cocaine into the two Counts of dealing in cocaine. On July 19, 2006, the trial court sentenced Beets to thirty years on Count I, with five years suspended and five years of probation, and ten years on Count V. The trial court ordered that the sentences be served concurrently.

Beets now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Jury Instructions*

We first address Beets' argument that the trial court abused its discretion by refusing his tendered instruction, which tracked the language of I.C. § 35-48-4-16, explaining the defenses to possessing cocaine within 1000 feet of a youth program center.

The purpose of a jury instruction is to inform the jury of the law applicable to the facts without misleading it, and to enable the jury to comprehend the case clearly and arrive at a just, fair, and correct verdict. *Overstreet v. State*, 783 N.E.2d 1140, 1163 (Ind. 2003), *cert. denied*. We review a trial court's refusal to give a tendered instruction for an abuse of discretion. *Springer v. State*, 798 N.E.2d 431, 433 (Ind. 2003), *reh'g denied*. We consider: (1) whether the instruction correctly sets out the law; (2) whether there is evidence in the record to support giving the instruction; and (3) whether the substance of

the tendered instruction is covered by other instructions. *Id*. "As a general rule, a defendant in a criminal case is entitled to have the jury instructed on any theory of defense which has some foundation in the evidence." *Howard v. State*, 755 N.E.2d 242, 247 (Ind. Ct. App. 2001). This is the case even if the evidence supporting the defense is weak and inconsistent. *Id*. However, the evidence presented at trial must have some probative value to support the defense. *Id*.

In order to convict Beets of possession of cocaine, as a Class A felony, the State was required to prove beyond a reasonable doubt that Beets knowingly or intentionally possessed cocaine in an amount of at least three grams, while in, on, or within one thousand feet of school property, a public park, a family housing complex, or a youth program center. *See* I.C. § 35-48-4-6. At trial, the State presented evidence that during the second arranged buy, Beets possessed cocaine within one thousand feet of a day care center. As a result, Beets now contends that the trial court abused its discretion in failing to instruct the jury on the defenses to a class A felony charge of possession of cocaine, enumerated in I.C. § 35-48-4-16, which states in pertinent part:

> (a) For an offense under this chapter that requires proof of:
>
> * * *
>
> (3) possession of cocaine . . .
>
> within one thousand (1,000) feet of school property, a public park, a family housing complex, or a youth program center, the person charged may assert the defense in subsection (b) or (c).
>
> (b) It is a defense for a person charged under this chapter with an offense that contains an element listed in subsection (a) that:

(1) a person was briefly in, on, or within one thousand (1,000) feet of school property, a public park, a family housing complex, or a youth program center; and

(2) no person under eighteen (18) years of age at least three (3) years junior to the person was in, on, or within one thousand (1,000) feet of the school property, public park, family housing complex, or youth program center at the time of the offense.

(c) It is a defense for a person charged under this chapter with an offense that contains an element listed in subsection (a) that a person was in, on, or within one thousand (1,000) feet of school property, a public park, a family housing complex, or a youth program center at the request or suggestion of a law enforcement officer or an agent of a law enforcement officer.

Our review of the record indicates that Beets' proposed instruction is taken directly from the aforementioned statute; thus, it certainly presents a correct statement of the law. Additionally, the record reveals that no other instruction covered the defenses of I.C. § 35-48-4-16. Therefore, the essential inquiry in deciding whether the trial court properly refused the instruction is whether there is evidence in the record that supports the giving of the instruction. In particular, we examine the question of whether there was evidence in the record to show that (1) Beets was only near the day care center for a "brief" period of time and no children less than eighteen years of age were at the day care center, or (2) Beets was within 1000 feet of the day care center at the suggestion or request of law enforcement, or an agent of law enforcement, namely the C.I.

As the second arranged buy occurred on a Thursday afternoon, when children are undoubtedly present at a day care center, it is of no significance whether Beets was only briefly near the day care center. The trial court agreed, as it refused to instruct the jury on I.C. § 35-48-4-16, explaining it did not think there was "any evidence that the location

was determined by anybody other than the defendant." (Tr. p. 304). However, Beets now argues that he did not arrange the controlled drug buy to occur near the day care center; instead, he contends the location of the buy was determined by Kokomo police officers. On the other hand, the State asserts that because the trial court merged Beets' Class A felony possession conviction into his Class A felony conviction for dealing in cocaine, this issue is moot. In other words, the State asserts that any Class felony of possession would have been merged into the dealing felony, and thus it does not matter whether Beets was wrongly convicted of a Class A felony for possession of cocaine. We disagree, as the merging of convictions is only done for sentencing purposes. Ignoring this issue has the potential to leave an improper Class A felony conviction on Beets' criminal record. As a result, we address the issue on its merits.

Our examination of the record shows that at trial, the C.I. testified that during the second controlled drug buy, he picked up Beets at an intersection, and once in the car, Beets told him to "just drive." (Tr. p. 132). The C.I. further testified that he later learned he "messed up," according to the police officers, by turning a wrong direction while Beets was in his vehicle. As a result of this testimony, along with the fact that the second controlled buy occurred in a moving vehicle – thereby making it difficult to ascertain the location or locations where Beets possessed cocaine – we believe that an instruction on I.C. § 35-48-4-16 would have been proper. Accordingly, even though we note that the record reflects careful thought by the trial court on this issue, we conclude that the trial court abused its discretion in refusing this tendered instruction. Rather than reversing and

remanding for a new trial, we reverse and remand with instructions to vacate Beets' conviction of possession of cocaine, as a Class A felony.[1]

II. *Admission of Evidence*

Second, we address Beets' arguments that the trial court: (1) improperly admitted hearsay testimony; (2) improperly prevented Beets from fully direct-examining his only witness; and (3) improperly admitted Exhibits 1, 4, 5, and 6 because the State failed to establish a chain of custody for these items.

The standard of review for admissibility of evidence issues is whether the trial court's decision was an abuse of discretion. *Allen v. State*, 813 N.E.2d 349, 361 (Ind. Ct. App. 2004), *trans. denied*. An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Crafton v. State*, 821 N.E.2d 907, 910 (Ind. Ct. App. 2005). Generally, errors in the admission or exclusion of evidence are to be disregarded as harmless unless they affect the substantial rights of a party. *Allen*, 813 N.E.2d at 361.

A. *Hearsay*

Beets claims the trial court wrongfully admitted hearsay testimony by Officer Adams regarding the ownership of a white vehicle, identified in the parking lot of Soupley's Liquor Store during the first controlled buy and used to establish Beets' identity. Hearsay, a statement made out of court that is offered into evidence to prove the truth of the fact or facts asserted in the statement itself, is not admissible at trial unless it

[1] Later in this Opinion, we determine that the State presented sufficient evidence that Beets committed dealing in cocaine, as a Class A felony; consequently, because possession of cocaine is a lesser-included offense of dealing in cocaine, remanding for a new trial would be a waste of the trial court's time and resources.

fits within some exception to the hearsay rule. Ind. R. Evid. 801(c); *Simmons v. State*, 760 N.E.2d 1154, 1159 (Ind. Ct. App. 2002).

In the present case, without submitting a business record, Officer Adams testified that he ran a license plate check on the vehicle Beets drove to the first controlled drug buy and discovered that it was registered to Williams, Beets' mother. Beets objected to Officer Adams' testimony, arguing it was hearsay and that the State was required to submit a document from the Bureau of Motor Vehicles to verify the license plate check and identity of the registrant. Specifically, Beets asserts that without documentation the jury could not have been certain the vehicle was registered to Beets' mother, and in turn, could not be certain that Beets was the person who drove the vehicle to the first controlled buy. Even though Beets offers no legal support for this contention, aside from reciting our standard of review, we agree that Officer Adams' testimony as to the license plate check results is hearsay. Nevertheless, in light of all the other evidence in this case establishing Beets as the person who participated in both controlled drug buys, we find that the trial court's admission of Officer Adams' testimony on this point is harmless. Accordingly, we will not reverse Beets' conviction based on this argument. *See Jacobs v. State*, 802 N.E.2d 995, 998 (Ind. Ct. App. 2004) ("[e]ven if the trial court abused its discretion in admitting evidence, we will not reverse a conviction of the error is harmless").

B. *Direct Examination*

Beets also claims the trial court abused its discretion in preventing his counsel from direct-examining his single witness, Officer Bruce Rood (Officer Rood), as to his

professional experience in examining substances believed to be illegal drugs. Specifically, Beets attempted to elicit testimony from Officer Rood that individuals in the Kokomo area have used other products, such as peanuts and bread, as look-alike substances for crack cocaine. This pertains to Beets' case in that the record reveals evidence that police officers did not test the substance within every plastic bag obtained as a result of the two controlled buys and Beets' arrest; thus, police officers only visually inspected a portion of the drugs.

Ind. Evid. Rule 402 provides, in pertinent part, that "[e]vidence which is not relevant is not admissible." Here, the following colloquy took place in front of the jury between the trial court, defense counsel, and the State regarding Officer Rood's experience with look-alike substances:

[DEFENSE COUNSEL]:	Have individuals in this community attempted to pass of peanuts or nuts as crack cocaine?
[COUNSEL FOR THE STATE]:	Ob--
[ROOD]:	Yes, they have.
[COUNSEL FOR THE STATE]:	--jection, Your Honor, it's irrelevant what other people are trying to pass off.
[TRIAL COURT]:	It's been asked and answered.
[DEFENSE COUNSEL]:	Has bread been used as an item to fake cocaine?
[COUNSEL FOR THE STATE]:	Again, Your Honor, [I] object to what other things have been done.
[TRIAL COURT]:	Sustained.

[COUNSEL FOR THE STATE]: We're only concerned about this situation.

[DEFENSE COUNSEL]: Your Honor, I believe both the Indiana State Police lab individuals who testified indicated they only did a visual inspection of the remaining rocks in this case and that none of them tested either one of those. If there are other items that are visually similar to, and this officer has experience regarding that, I think that would be relevant in this case.

[TRIAL COURT]: I think that would have been a better question for the lab tech. Objection sustained.

(Tr. pp. 283-84).

In our evaluation, the trial court did not abuse its discretion in limiting Beets' examination of Rood during this line of questioning. Rather, we find the trial court's assessment reasonable, *i.e.*, that any questions about the visual or actual inspection of the packages should have been directed to the lab technician who tested the substance. Further, Rood's experience with look-alike substances in other cases is not directly applicable to Beets' case. Moreover, the record indicates that enough of Rood's testimony was admitted so that, in our opinion, a juror would be led to understand that there are non-drug substances which have the appearance of cocaine. Thus, we conclude the trial court did not err in sustaining the State's objection to the admission of any further testimony by Rood pertaining to look-alike substances.

C. *Chain of Custody*

Next, Beets argues that the State failed to establish a chain of custody for Exhibits 1, 4, 5 and 6, all plastic bags containing cocaine. Specifically, Beets contends that the bags were sent to a laboratory in Fort Wayne, Indiana for testing, but then ended up in Indianapolis without any explanation.

The State is required to show a chain of custody for the purpose of showing the unlikelihood of tampering, loss, substitution, or mistake. *McCotry v. State*, 722 N.E.2d 1265, 1267 (Ind. Ct. App. 2000), *trans. denied*. "When dealing with fungible evidence such as cocaine, the State must give reasonable assurance the property passed through the hands of the parties in an undisturbed condition." *Whaley v. State*, 843 N.E.2d 1, 7 (Ind. Ct. App. 2006), *trans. denied* (quoting *Johnson v. State*, 594 N.E.2d 817, 818 (Ind. Ct. App. 1992)). It is not necessary for the State to establish a perfect chain of custody, and once the State strongly suggests the exact whereabouts of the evidence, any gaps go to the weight of the evidence and not its admissibility. *Bussberg v. State*, 827 N.E.2d 37, 42 (Ind. Ct. App. 2005), *reh'g denied*, *trans. denied*.

The defendant can challenge the adequacy of the chain of custody; however, he must present evidence which does more than raise a mere possibility that the evidence could have been tampered with. *McCotry*, 722 N.E.2d at 1267. Furthermore, there is a presumption of regularity in the handling of evidence by officers, and there is a presumption that officers exercise due care in handling their duties. *Bussberg*, 827 N.E.2d at 42.

Our review of the record shows testimony by Kokomo Police Department property clerk, Kyle Peters (Peters), that after the first controlled buy, Exhibit 1 was transported to

Fort Wayne Regional laboratory for testing on May 18, 2005. Likewise, following the second controlled buy and Beets' arrest, Peters himself transported Exhibits 4, 5, and 6 to Fort Wayne on July 7, 2005. However, due to a backlog at the Fort Wayne lab, the Indiana State Police transported all of the items to Indianapolis Regional Laboratory for testing. Peters further testified that in October of 2005, after the items were tested, he picked them up in Indianapolis and returned them to Kokomo. Additionally, Peters testified that upon gathering the evidence, all of the bags were marked with tracking stickers and sealed appropriately prior to transportation. While no witness from the Indiana State Police testified to transporting the bags from Fort Wayne to Indianapolis, there is evidence in the record that the Fort Wayne lab was forced to transport a large amount of evidence to Indianapolis for testing – not just from Beets' case – due to its waiting time of approximately one year for results. Consequently, we find that the State presented evidence strongly suggesting that the whereabouts of the evidence were known at all times. *See Bussberg*, 827 N.E.2d at 42; *see also McCotry*, 722 N.E.2d at 1267. Thus, we conclude that the trial court properly admitted this evidence and that the State presented a sufficient chain of custody for the evidence.

III. *Sufficiency of the Evidence*

Lastly, we review Beets' claim that the State presented insufficient evidence to convict him of Count I, dealing in cocaine, as a Class A felony.[2] Specifically, Beets contests the State's determination that the cocaine he dealt was in excess of three grams.

[2] Beets additionally contends the evidence is insufficient to convict him of Count II, possession of cocaine, as a Class A felony. We need not address this claim as we instruct the trial court to vacate Beets' conviction on Count II due to its error in jury instructions discussed earlier in this Opinion.

Our standard of review for a sufficiency of the evidence claim is well settled. In reviewing sufficiency of the evidence claims, we will not reweigh the evidence or assess the credibility of the witnesses. *Cox v. State*, 774 N.E.2d 1025, 1028-29 (Ind. Ct. App. 2002). We will consider only the evidence most favorable to the judgment, together with all reasonable and logical inferences to be drawn therefrom. *Alspach v. State*, 755 N.E.2d 209, 210 (Ind. Ct. App. 2001), *trans. denied*. The conviction will be affirmed if there is substantial evidence of probative value to support the conviction of the trier of fact. *Cox*, 774 N.E.2d at 1028-29.

Here, in order to convict Beets of dealing in cocaine as a Class A felony, the State was required to prove beyond a reasonable doubt that he knowingly or intentionally delivered cocaine weighing three or more grams, or that he possessed, with the intent to deliver, cocaine weighing three or more grams. I.C. §§ 35-48-4-1(a); 35-48-4-1(b). On appeal, Beets now argues that the State failed to present evidence as to the exact weight of the cocaine seized. In our examination of the record, we find testimony by Elizabeth Griffin (Griffin), forensic scientist for the Indiana State Police, indicating she tested and weighed the contents of the bags seized as a result of the second controlled buy. Specifically, she testified that the bag sold to Officer Klepinger weighed 1.83 grams, and the bag sold to the C.I. weighed 2.95 grams. Additionally, Griffin testified that she ran multiple tests on the substances inside the bags, which revealed that they all contained a cocaine base. In light of this evidence, we conclude the State presented sufficient proof that Beets delivered cocaine in excess of three grams, thereby committing the Class A felony of dealing in cocaine.

CONCLUSION

Based on the foregoing, we conclude: (1) the trial court abused its discretion in refusing to give the jury instructions on the defenses enumerated in I.C. § 35-48-4-16; consequently, we remand this issue and instruct the trial court to vacate Beets' conviction for possession of cocaine, as a Class A felony; (2) the trial court did not abuse its discretion in admitting various pieces of evidence; and (3) the State presented sufficient evidence that Beets dealt in cocaine, as a Class A felony.

Reversed in part, affirmed in part, and remanded with instructions.

NAJAM, J., and BARNES, J., concur.